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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 469

CHARLES E. DABOLL, JR., AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL, LOCAL UNION 797, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 216 F. 2d 143. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 15-42, 44-53) are reported at 105 NLRB 311.

JURISDICTION

The judgment of the court below was entered on September 17, 1954. The petition for certiorari

was filed on December 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board properly asserted jurisdiction over petitioners.

2. Whether the Board's findings that petitioners, in violation of the Act, discriminated against job applicants pursuant to an illegal hiring agreement are supported by substantial evidence on the record considered as a whole.

3. Whether the immunity provided in Section 102 of the Act for the performances of any obligation under a collective bargaining agreement entered into prior to the date of the enactment of the amended Act extends to an agreement entered into in 1952 between the union and the petitioner employer, which adopted the terms of a pre-amended Act contract between the union and other employers.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 12-17.

STATEMENT

I. The Board's findings of fact, conclusions of law, and order

A. *Petitioner Daboll's business.*—Petitioner Daboll is a plastering contractor. During the year 1952 (the period here involved) Daboll operated

simultaneously in the States of Nevada and California (R. 18-19; 94, 77, 371-372). He performed services in California, for which he received in that year more than $27,000, and services in Nevada amounting to $323,000, almost all of which was performed on the Federal Homes housing development in Henderson, near Las Vegas, Nevada (R. 18-19, 21; 94, 371, 372). During the same period, materials valued at more than $77,000 were shipped from California to Daboll's Nevada operations (R. 18-19; 97, 391, 422-423).

B. *The unfair labor practices.*—On December 20, 1951, Daboll entered into a contract with Federal Homes to plaster 352 residential housing units (R. 18; 321). Daboll had no individual contract with petitioner Union. In January 1952, prior to commencing operations at the project, Daboll and the Union agreed to adopt and be bound by a master contract entered into between other contractors in the Nevada area and the Union on January 1, 1951 (R. 22; 103-107). Under the terms of this contract, the contractors undertook to "require that all Plasterers on the job shall be members in good standing" of the Union, while the Union on its part agreed to furnish competent men. The agreement further provided that if the Union was unable to furnish men within a stipulated period, "the employer shall be free to request men himself through other local unions provided the employer abides" by the constitutions of the local and the International "and the men have clearances from [petitioner] Local No. 797 before going to work"

(R. 23; 105-106). Under the constitutions of the International and the Local, union men are prohibited from working with nonmembers (R. 285-287).

The issuance of work clearances by the Union was controlled by its Working Rules, which, according to Business Agent Berry, were rigidly enforced (R. 310-311). Section 16 of those rules directs the business agent "not [to] issue a permit to anyone not a member of Plasterers and Cement Finishers without consent of the body at a regular meeting when there are members of the craft in question out of work" (R. 285).

In mid-September 1951, Clarence B. Sells and Wesley Sinclair, both experienced plasterers but members of another local, went together to the office of petitioner Union to apply for work (R. 24; 153, 156, 215-217). Jerry Berry, the Union's business agent, told them that no plastering work was available in the area (R. 24; 157-160, 218-219). In the ensuing months, both employees kept in touch with the Union in the hope of procuring work, but each time Berry advised them that none was available (R. 24; 160-161, 187-191, 220-222).

On March 10, 1952, Sells and Sinclair went directly to Daboll's Federal Homes project in search of work. They sought out Fred Longstreet, Daboll's foreman on the job (R. 24-25; 88, 90, 170, 227). Longstreet informed them that he needed plasterers, that he could give them jobs "in a minute" but that his hands "are tied." He told them to secure "clearance" from Berry, remarking that

Berry was the "boss" who ran things around the project and if he hired anyone without prior clearance from him the job would be "tied up" by a work stoppage (R. 25; 171, 227-228).

Thereafter, on several occasions, Sells and Sinclair renewed their attempts to secure clearance from Berry, but to no avail (R. 25, 26; 172-173, 175-177, 180-183, 228-229). On each occasion, Berry informed them that no work was available (*ibid.*).

On April 29, 1952, Sells in behalf of himself and Sinclair filed unfair labor practice charges against both the Union and Daboll (R. 26; 1-4, 183). Subsequently, Sells and Sinclair saw Daboll and described their inability to obtain employment with his company (R. 26; 182-184, 230-231, 265-268). Daboll replied, "Well, personally I would give you a job if I could. Up here I can't do it. The union * * * has got my hands tied" (R. 26; 184-185).

At the hearing before the Board, Union Business Agent Berry testified that he had not referred Sells and Sinclair to any plastering jobs because no such jobs were open at any time when they were seeking work (R. 28; 283, 293, 298-300). However, the records of employment at Daboll in evidence establish that between March 5, 1952, and April 30, 1952, the period here in question, Daboll himself, excluding other contractors in the area, hired at least 30 plasterers through the Union (R. 28; 331-348). Berry also testified that in referring employees to jobs, preference was given to permanent residents of Las Vegas, practically all of whom are members

of petitioner local over "floaters" from out of town, practically all of whom, like Sells and Sinclair, are members of foreign locals (R. 28; 311-312, 323-324).

C. *The Board's conclusions and order.*—The Board concluded that Daboll was engaged in commerce within the meaning of the Act and that, in view of the fact that he conducted a multi-state enterprise or performed out-of-state services valued in excess of $25,000, he satisfied the Board's administrative criteria for the exercise of its statutory jurisdiction (R. 21, 45). The Board further concluded that Daboll violated Section 8(a)(1) and (3) of the Act by adopting, entering into, and giving effect to an illegal union-security agreement with the Union and by refusing to employ Sells and Sinclair because they had not obtained work clearances from the Union (R. 31-32). The Board also concluded that the Union violated Section 8(b)(1)(A) and (2) of the Act by executing and giving effect to the illegal union-security agreement and by causing Daboll illegally to refuse to employ Sells and Sinclair (R. 31-32). The Board rejected petitioners' claim of immunity based upon Section 102 of the Act which provides that it shall not be an unfair labor practice under the amended Act to carry out "any obligation under a collective bargaining agreement entered into prior to the date of the enactment of this Act [June 23, 1947] if the performance of such obligation would not have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to

the effective date of this title [August 22, 1947], unless such agreement was renewed or extended subsequent thereto." Petitioners asserted that the 1951 agreement between the Union and the contractors in the Nevada area, with which petitioner Daboll agreed in 1952 to comply, was a continuation of a 1946 agreement between the Union and the Master Plumbers of Las Vegas, and hence within the protection of Section 102. The Board rejected this claim as unsupported by any reliable evidence [1] and for the further reason that, in any event, Daboll did not become a party to the agreement until 1952 (R. 29-30, 44-45), and therefore the contract between him and the Union did not fall within the exception of Section 102. Accordingly, the Board ordered petitioners to cease and desist from the unfair labor practices found; to jointly and severally make Sells and Sinclair whole for any loss of pay suffered by them as a result of the discrimination against them; and to post appropriate notices (R. 46-53).

II. The decision of the court below

The court below enforced the Board's order (Pet. App. 1-3). It upheld as proper the Board's exercise of jurisdiction over petitioners and affirmed as "clearly correct" the Board's finding that petitioners had engaged in unfair labor practices as set forth above. The court also rejected

[1] The 1946 contract was not introduced in evidence. The Board found that the credited testimony did not establish that the 1951 agreement was a continuation of a contract executed in 1946 (R. 30).

petitioners' defense based upon Section 102, pointing out that even if the 1951 agreement between the Union and the contractors in the Nevada area was but a continuation of a 1946 agreement as contended by petitioners, Daboll did not become a party thereto until 1952 when the parties adopted it "in an independent agreement" and that agreement could not have "such retroactive effect as to bring it within the protection of § 102."

ARGUMENT

Petitioners' contention (Pet. 7-11) that the Board in exercising its statutory jurisdiction in the instant case misapplied or departed from its administrative jurisdictional policy is insubstantial and presents no question warranting certiorari.[2] As the court below correctly held (Pet. App. 2), since Daboll operated simultaneously in two states during 1952, that sufficed to bring him within the Board's "multi-state" administrative criteria for the exercise of its statutory power and petitioners have made no showing that the Board exceeded the permissible limits of its discretion in relying upon this test here.[3] Furthermore, in view of the cir-

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[2] The parenthetical suggestion in petitioners' question No. 1 that Daboll's operations are *de minimis* and hence do not fall within the coverage of the Act overlooks the Court's decisions in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 696, 699; and *National Labor Relations Board* v. *Denver Building Council*, 341 U.S. 675, 683-685.

[3] Since the "multi-state" character of Daboll's operations alone suffices to bring Daboll within the Board's administrative criteria governing the exercise of its statutory jurisdiction,

cumstance that the administrative criteria relied on by the Board were adopted prior to petitioners' unfair labor practices, the court below also correctly ruled (Pet. App. 2) that petitioners cannot validly claim that "the Board has acted in violation of previously prescribed standards upon which [petitioners] had a right to rely and the disregard of which would lead to an injustice." Cf. *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 13 (C. A. 1); *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 144-150 (C. A. 9).[4]

---

it is unnecessary to deal with petitioners' contention (Pet. 7-9) that the record fails to establish that Daboll performed "out-of-state" services in 1952 in California sufficient to satisfy the Board's out-of-state service criteria on which the Board also relied, in the alternative, in exercising jurisdiction in the instant case. In any event, even if, as petitioners assert, there is no such showing with respect to California, it is clear that while Daboll was still operating in that state, he performed out-of-state services in 1952 in Nevada sufficient to satisfy the Board's administrative yardstick. From January to October 1952 Daboll performed services on the Federal Homes Project in Nevada for which he received $323,000 (R. 371-372; *supra*, p. 3). It is a fair inference that at least $25,000 worth of these services were performed between January and June 1952, during which time Daboll was still operating in California.

[4] *National Labor Relations Board* v. *National Gas Co.*, 215 F. 2d 160 (C.A. 8), cited by petitioners (Pet. p. 10), is not in point. There the court declined to enforce a Board order because in its view the Board had subsequently "expressly overruled" the decision in which the order had issued as an "unwarranted extension" of its then controlling jurisdictional policy. Although the Board has recently modified its jurisdictional policy, and under its current policy might not now assert jurisdiction over Daboll, there is no suggestion that it has "overruled" the instant case as an "unwarranted extension" of the standards applicable when the case was decided. See *Coca Cola Bottling Co.*, 110 NLRB No. 134, 35 LRRM 1131. Cf. *Ray Brooks* v. *National Labor Relations Board*, No. 21, this Term, slip op. p. 8, n. 16.

Petitioners' challenge (Pet. 12-15) to the substantiality of the evidence supporting the Board's unfair labor practice findings likewise raises no issue warranting review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U. S. 498, 503. Moreover, as the Statement shows (*supra,* pp. 3-6), and as the court below found (Pet. App. 3), the Board's finding that petitioners entered into an illegal union security agreement pursuant to which the two job applicants were illegally denied employment "is clearly correct." See also *Radio Officers' Union* v. *National Labor Relations Board,* 347 U. S. 17.

Finally, contrary to petitioners' assertion (Pet. 11-12), the court below correctly ruled that Section 102 of the Act afforded no defense to petitioners. Even assuming that the 1951 contract between the Union and the contractors in the Nevada area was but a continuation of a 1946 contract, the terms of that contract, as the court below pointed out (Pet. App. 3), were adopted by petitioners in 1952 "in an independent agreement which became the contract of the parties as of that date. It could have no retroactive effect as to bring it within the protection of § 102."

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any

other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employes eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to

other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employer with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the plead-

ings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and

240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act * * * if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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